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No. 94-1929

In The

Supreme Court of the United States

October Term, 1994

ALLSUP'S CONVENIENCE STORES, INC.,

Petitioner,

v.

ROBERT JOHNSEN,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeals Of The State Of New Mexico

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Where nature of employee's duties are that of a maintenance person and do not affect the safety of operation of motor vehicles, is the jurisdiction of the Secretary of Transportation invoked under the Motor Carrier Act, 29 U.S.C. Sections 3102 to 3104 thereby exempting employee from the overtime compensation provisions of the Fair Labor Standards Act, 29 U.S.C. Sections 201 to 219?

PARTIES

All parties are named in the caption.

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BRIEF IN OPPOSITION

The Respondent respectfully urges that the Petition for Writ of Certiorari prayed for by the Petitioners herein be denied for the reasons hereinafter set forth.

OPINIONS BELOW

There is no need to refer to a summary of the Opinion, as the Opinion appears in full beginning on page A-1 of Appendix A of Petitioner's Petition.

STATEMENT OF THE CASE

Respondent contradicts and supplements the Petitioner's Statement of the case as follows:

Respondent contradicts the statement in the second paragraph that " . . . employee was a salaried truck driver . . . ", as employee was hired at the hourly rate of $8.31 in 1989 as paycheck statements reflect. Employee was employed as a district maintenance person and performed a variety of tasks, including the repair and maintenance of Employer's stores within his district. Incidental to Employee's maintenance responsibilities, he drove from store to store to perform his maintenance duties. Employee was not a salaried truck driver and was primarily engaged in maintaining store equipment and fixtures on behalf of Employer.

In the third paragraph the objection to the Statement is that it incorrectly states that safety is the focus of the Motor Carrier Act (MCA) 49 U.S.C. Section 3102 exemption to the overtime requirements of the Fair Labor Standards Act (the Act). Fair Labor Standards Act 29 U.S.C. Sections 201 to 219 (1988). The New Mexico Court of Appeals correctly stated that the jurisdiction of the Secretary of Transportation is limited to those employees whose activities affect the safety of operation of motor vehicles transporting property in interstate commerce.

In 1989, Employee was hired as maintenance man by Employer and earned $8.31 per hour. Employee performed general maintenance work for Employer's stores located entirely within New Mexico. For two and one-half years, Employee regularly worked in excess of forty

hours per workweek without receiving overtime compensation. Employee received the same amount of pay each week, despite the number of hours he worked.

Employee carried a general inventory of parts and supplies on his service vehicle in order to perform his maintenance duties. The parts may be separated into three separate categories. The first two types of parts were parts obtained from Employer's own warehouse in New Mexico and parts obtained from local wholesalers not affiliated with Employer. The third type of part was generated when the local wholesaler did not have a part in stock and Employee placed a special order which the wholesaler would fill specifically for Employee. The type of part becomes important in analyzing whether Employee engaged in interstate commerce and in determining whether Employee is entitled to overtime compensation.

It is undisputed that Employer falls within the overtime provisions of the Fair Labor Standards Act. The question of fact which remains is whether Employee's duties affected the safety of operation of motor vehicles and involved the transportation of property in interstate commerce.

SUMMARY OF THE ARGUMENT

A genuine issue of material fact exists regarding whether Employee falls outside of the overtime compensation requirements of the Act and within the MCA

exemption. The nature of Employee's duties do not trigger the MCA exemption as Employee did not affect the safety of operation of motor vehicles and was not engaged in interstate commerce. The New Mexico Court of Appeals correctly noted the existence of a genuine issue of material fact and properly reversed the granting of summary judgment and remanded the case for further proceedings.

REASONS FOR DENYING THE WRIT

There is no justification for the granting of a Writ in this case as the lower Court followed long-standing federal caselaw, Supreme Court decisions and other Tenth Circuit decisions.

Petitioner states that Employee should be exempt from the overtime provisions of the Act because he drove on interstate highways and thereby affected the safety of operation of motor vehicles. If this type of employment duty triggered the MCA exemption to the Act, then every employee who drives incidental to the performance of his duties would be exempt from receiving overtime compensation.

It is important to understand the dual role of interstate commerce in this case. Employer must be engaged in interstate commerce to fall within the overtime pay requirements of the Act. In contrast, Employee must not be engaged in interstate commerce to fall within the overtime provisions of the Act. While the first threshold of interstate commerce is met by Employer, Employee

does not meet the second threshold of interstate commerce because he did not travel interstate and is entitled to overtime compensation pursuant to the Act.

Employee maintained stores in a district entirely located within the State of New Mexico. This district required Employee to travel *intrastate* to perform his duties. The character of Employee's duties was to maintain Employer's stores within the district and those duties did not require travel across state lines.

It is the character of the employee's activities which determines the need for the Department of Transportation's power to be invoked for purposes of the MCA exemption to apply. *Levinson v. Spector Motor Service,* 330 U.S. 649, 67 S.Ct. 931, 91 L.Ed. 1158 (1946); *Pyramid Motor Freight Corp. v. Ispass,* 330 U.S. 695, 67 S.Ct. 954, 91 L.Ed. 1184 (1946); *Morris v. McComb,* 332 U.S. 422, 92 L.Ed. 44, 68 S.Ct. 131 (1947). Employee did not perform mechanical repairs on any of Employer's vehicles and did not have primary or secondary responsibilities for keeping Employer's vehicles in good working order. The character of Employee's duties were that of a maintenance worker which involved general repairs to store fixtures and equipment, not vehicles.

Petitioner cites *Morris,* for the proposition that the MCA exemption was proper where the duties affect safety of operation of motor vehicles only for a small percentage of the total work time. In *Morris,* employer's principal business was the transportation of steel and that of a general cartage service. In contrast, Employer in this case is in the convenience store business and sells a range

of items from food to dish soap. Employer is not primarily engaged in the transportation or cartage business but is principally involved in the convenience store industry.

Also distinguishable is Petitioner's cite to *Foxworthy v. Hilanà Dairy Co.*, 997 F.2d 670 (CA10, 1993). Again, the principal business of employer in that case was that of a delivery service and employee was responsible for making the deliveries. Mr. Johnsen in this case drove within the State of New Mexico to accomplish his duties as a maintenance man and not pursuant to any delivery responsibilities.

Under the *Foxworthy* analysis, the transportation of parts within a single state may still result in interstate commerce and invoke the MCA exemption from overtime. The Opinion states that Employee engaged in *intrastate* commerce for purposes of the MCA exemption when he transported parts received from Employer's own warehouse or from a local wholesaler who had the part in stock. Under those circumstances, Employee is entitled to overtime pay and is not within the MCA exemption. When Employee had to specially order parts, the Opinion states that he was engaged in *interstate* commerce if the part originated from out-of-state suppliers. The conclusion made is that if Employee transported specially ordered parts which originated from out-of-state, then he may be exempt from receiving overtime compensation.

The question which remains is how often, if at all, did Employee engage in interstate commerce by way of transporting specially ordered parts? This is the genuine issue of material fact which precluded summary judgment from being granted and prompted the New Mexico

Court of Appeals to properly reverse the granting of summary judgment.

CONCLUSION

Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari as the New Mexico Court of Appeals has properly reversed summary judgment due to the existence of a genuine issue of material fact.

Respectfully submitted,

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